**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Assessment and Collection of Regulatory Fees for Fiscal Year 2016 | ) | MD Docket No. 16-166 |
| | ) | |

**REPLY COMMENTS**

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July 5, 2016

## TABLE OF CONTENTS

## I. INTRODUCTION

The American Cable Association ("ACA") submits these reply comments in response to comments filed concerning the Notice of Proposed Rulemaking ("NPRM") in the above-captioned docket.[1] ACA confines its reply to the question of the appropriate fee level to be assessed Direct Broadcast Satellite ("DBS") fee payors in the Cable/IPTV fee category. Remarkably, despite the NPRM's proposal to increase the regulatory fee assessed the two DBS providers by only 12 cents per subscriber per year to a total of 24 cents – an amount that keeps the rate 75 percent below the amount proposed to be assessed to their direct cable and IPTV provider competitors[2] – the DBS providers oppose the proposal on the grounds that it is neither explained nor justified, will cause "rate shock," and will harm DBS consumers and engender uncertainty as to future rates.

ACA agrees that the Commission's proposed DBS fee is not set at an appropriate level, but differs with the DBS providers significantly as to the right amount for 2016. Once again, the "proposed rate for DBS is inexplicably and unreasonably low, leaving an unfair share of Media Bureau regulatory fees to be borne by cable operators and IPTV providers."[3] Not only is the minimal upward adjustment proposed in the NPRM warranted, fairness requires a far more significant upward adjustment to address the existing and continuing problem of cable operators and IPTV providers cross-subsidizing the regulatory fee burden of their DBS competitors that the GAO identified with the Commission's regulatory fee program in 2012.[4] The Commission has provided no basis for assessing a disproportionately low baseline fee of only 24 cents per

[1] *Assessment and Collection of Regulatory Fees for Fiscal Year 2016,* Notice of Proposed Rulemaking, MD Docket No. 16-166 (rel. May 19, 2016) ("NPRM").

[2] NPRM, ¶ 10.

[3] *See Procedures for Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, MD Docket No. 15-121, Comments of the National Cable & Telecommunications Association and American Cable Association at 4 (filed June 22, 2015) ("NCTA-ACA 2015 Comments").

[4] Government Accountability Office, "*Federal Communications Regulatory Fee Process Needs to be Updated*," at 18 (Aug. 2012) ("GAO Report").

DBS subscriber per year (together with a three-cent facilities reduction fee) when it proposes to assess cable operators and IPTV providers $1.00 per subscriber per year.  Rather than adopt the proposed DBS fee (or decrease it by any amount), the Commission must increase it.  By imposing a higher fee, the Commission will ensure a more equitable distribution of the burden of supporting Media Bureau full time equivalent employees ("FTEs") who regulate the multichannel video programming distributor ("MVPD") services that cable, IPTV and DBS MVPDs provide. Claims by the DBS providers that the Commission's proposal increase will cause "rate shock" or consumer harm should not be given any credence.  The DBS providers have been on notice for years that they would eventually have to pay fees to support Media Bureau oversight and regulation of MVPD services and that the initial fee level was subject to an upward adjustment. Moreover, there is no evidence that "rate shock" occurred when the Commission imposed a 99 cent per subscriber fee on IPTV providers in 2014, or when a 12 cent per subscriber fee was assessed on DBS providers last year, or that the concept has much validity in this context at all. To the extent the DBS providers believe paying their fair share of regulatory fees would harm their subscribers, they have the option of absorbing the increased costs themselves.  However, to the extent regulatory fees imposed on MVPDs are passed through to customers, the real harm that exists and continues to exist is that cable customers are paying higher regulatory fees than DBS customers.

ACA reiterates its position that given evidence before the Commission in this proceeding and in light of its previous finding that DBS, cable television and IPTV services all receive comparable oversight and regulation as MVPDs as a result of the work of Media Bureau FTEs and therefore impose similar burdens on the Commission,[5] the Commission should assess all payors in the Cable/IPTV fee category the same level of fees, thus achieving full parity in fiscal

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[5] NPRM, ¶ 9, *quoting Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, Notice of Proposed Rulemaking, Report and Order, and Order, 30 FCC Rcd 5354, ¶ 33 (2015) ("FY 2015 NPRM and Order").

year ("FY") 2016, or, at a minimum, the Commission should double the proposed baseline DBS fee for FY 2016 and commit to bringing DBS into full parity with cable and IPTV by FY 2017.[6] Taking either action will fully address DBS concerns about the potential for future uncertainty as to DBS fee levels.

## II. DBS PROVIDER OBJECTIONS TO UPWARD ADJUSTMENTS TO THEIR MEDIA BUREAU FEES ARE UNFOUNDED

As the DBS providers are well aware, although the Commission in 2015 set the initial DBS regulatory fee at a very low level relative to the Cable/IPTV rate, the Commission plainly stated that it would "update this rate for future years, based on relevant information, as necessary for ensuring an appropriate level of regulatory parity and considering resources dedicated to this new regulatory fee subcategory."[7] Nonetheless, DBS providers object to the NPRM's proposed upward adjustment on the grounds that it is not justified by any increase in the amount of Media Bureau resources devoted to DBS issues, would cause "rate shock," would harm DBS subscribers, and create future uncertainty for these operators. These objections lack merit.

In its Comments, ACA demonstrated that all payors in the Cable/IPTV fee category have imposed and continue to impose similar burdens on Media Bureau resources used to administer MVPD regulation, have received and continue to receive similar regulatory benefits in their provision of MVPD services, and therefore should be assessed similar regulatory fees to support Media Bureau MVPD activities.[8] While the Commission's proposed DBS rate

[6] *Assessment and Collection of Regulatory Fees for Fiscal Year 2016,* MD Docket No. 16-166, Comments of the American Cable Association at 2, 7-11 (filed June 20, 2016) ("ACA Comments").

[7] FY 2015 NPRM and Order, ¶ 31.

[8] In addition to rulemaking proceedings cited in the NPRM, DISH Network or DIRECTV (as part of the AT&T family) or both, like ACA, have participated in nearly all proceedings affecting MVPDs that have been administered in whole or in part by the Media Bureau since September 2015, together making roughly two dozen filings over that time period in proceedings the outcome of which will affect all MVPDs equally. ACA Comments at 3-7. The relatively small difference from a regulatory perspective between DBS and Cable/IPTV providers in the past and through today justifies requiring DBS providers to pay

represents an upward adjustment for DBS providers, the proposed Cable/IPTV fee of $1.00 continues to dwarf the proposed DBS rate. ACA also pointed out that the NPRM's stated justification that the upward adjustment was based on the Commission's "analysis of the resources dedicated to [DBS] subcategory, including the resources dedicated to the pending portfolio of MVPD proceedings,"[9] is flatly inconsistent with both the rationale for initially bringing DBS into the Cable/IPTV fee category (greatly increased Media Bureau workload with respect to regulation of MVPDs and MVPD services) and the evidence before the Commission on DBS utilization of Media Bureau resources (similar use of Media Bureau FTEs) in years past and present.[10]

More particularly, ACA disagrees with the DBS providers that the adjustment is too high. The record not only supports the proposed 12 cents per subscriber per year – a mere 1 cent per subscriber per month – upward adjustment in the baseline DBS fee, but supports a far higher upward adjustment to bring the rate into parity with that assessed cable operators and IPTV providers.[11] Not only is the minimal upward adjustment proposed in the NPRM warranted, but fairness requires a far more significant upward adjustment to address the persistent problem of cable operators and IPTV providers cross-subsidizing the regulatory fee burden of their DBS competitors that the GAO identified with the Commission's regulatory fee program in 2012.[12]

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similar regulatory fees as Cable/IPTV providers, as opposed to assessing them uniquely low fees relative to those paid by MVPDs competing in the marketplace for the same subscribers. *Id.* at 7-11.

[9] NPRM, ¶ 10.

[10] ACA Comments at 7-11.

[11] Once again, ACA finds the "proposed rate for DBS is inexplicably and unreasonably low, leaving an unfair share of Media Bureau regulatory fees to be borne by cable operators and IPTV providers." *See* NCTA-ACA 2015 Comments at 4.

[12] GAO Report at 18.

### A. Upward Adjustment of the Regulatory Fees Assessed DBS Providers in Support of Media Bureau MVPD Regulatory Activities is Fully Justified.

DISH and AT&T object to the proposed upward revision of the DBS fee rate from 12 cents per subscriber per year to 27 cents per subscriber per year for FY 2016, representing a baseline fee of 24 cents and a three-cent facilities reduction/relocation fee per DBS subscriber per year.[13] The DBS providers protest on the grounds that even this modest proposed increase is unjustified and unsupported by a demonstration that the rate adjustment is based on relevant information and considers the resources dedicated to this new regulatory fee category, which the Commission suggested in its 2015 Fee Order.[14]

In support of their contention that the upward adjustment is unjustified, the DBS providers note that the NPRM cites only two proceedings in the last year applicable to all MVPDs alike.[15] DISH, for example, argues that these two proceedings (new rules requiring cable, DBS and other Commission licensees to post their public files documents to a Commission-hosted database, and the open NPRM regarding cable and DBS set-top boxes), do not justify more than doubling the rate that DBS providers must pay as proposed in the NPRM.[16] Further, DISH argues that the Commission has failed to provide information showing that the proposed fee "is in fact 'reasonably' equal to the amount of staff resources appropriated for DBS activities" or "how regulatory developments in the last year have impacted staff

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[13] NPRM, ¶ 10. *Assessment and Collection of Regulatory Fees for Fiscal Year 2016,* MD Docket No. 16-166, Comments of DISH Network LLC at 2-6 (filed June 20, 2016) ("DISH Comments"); Comments of AT&T Services, Inc. at 1-3 (filed June 20, 2016) ("AT&T Comments"). AT&T additionally objects to the assessment of regulatory fees to cover the Commission's one-time facilities reduction costs as unsuitable for the inclusion in the regulatory fee request on the grounds that the Commission had over-collected regulatory fees for FY 2015 in the amount of $98.367 million, which was sent to the US Treasury, and should therefore look to Congress to fund its move to new facilities. *Id.* at 3. ACA expresses no view on this separate issue.

[14] AT&T Comments at 2-3; DISH Comments at 2-3; *See Assessment and Collection of Regulatory Fees for Fiscal Year 2015,* Report and Order and Further Notice of Proposed Rulemaking, 30 FCC Rcd 10268, ¶ 20 (2015) ("FY 2015 Order and FNPRM").

[15] AT&T Comments at 2-3; DISH Comments at 4.

[16] DISH Comments at 4.

resource allocation consistent with the 125 percent fee increase proposed for FY 2016."[17] These objections lack merit.

The fundamental problem with the DBS per subscriber fee level is that it was set too low at the outset given the overwhelming evidence provided in past proceedings that the Media Bureau dedicates a comparable amount of time to matters common to cable operators, IPTV and DBS providers. An upward adjustment of the DBS fee to parity with the Cable/IPTV fee or to an amount higher than the amount proposed in the NPRM is already justified based on an analysis of Media Bureau work over the past few years as presented by ACA and NCTA in past proceedings.[18] Moreover, evidence presented by ACA in this proceeding that the Media Bureau continues to allocate a comparable amount of time, and DBS continues to receive a comparable amount of benefit from Media Bureau activities justifies a DBS regulatory fee level that is comparable to the rate assessed to cable operators and IPTV providers.

The DBS providers miss the mark by focusing solely on Media Bureau resources allocated to DBS matters in the past year, particularly the two rulemakings cited in the NPRM, to support their claim that no upward adjustment in the DBS fee is warranted. First, the DBS providers misconstrue the task of the Commission in justifying adjustments to the regulatory fee levels assessed to fee payors from year to year. There is no legal or policy justification for requiring the cable and IPTV industries to demonstrate that the Media Bureau allocated a higher percentage of FTE time on DBS matters than in the previous year in support of an upward adjustment in DBS fees year after year. Moreover, the DBS providers are incorrect in requiring

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[17] *Id.* at 3.

[18] *See Procedures for the Assessment and Collection of Regulatory Fees for Fiscal Year 2014, Assessment and Collection of Regulatory Fees for Fiscal Year 2013, Assessment and Collection of Regulatory Fees*, MD Docket Nos. 14-92, 13-140, 12-201, Comments of the National Cable & Telecommunications Association and the American Cable Association at 11, Attachments B and C (filed Nov. 26, 2014) ("NCTA/ACA 2014 Comments") (summarizing Media Bureau personnel present at DBS provider ex parte meetings from January 2010 – November 2014).

the Bureau to justify its proposed fees with any sort of scientific precision based on increases in the amount of time Media Bureau FTEs spent on DBS matters (even assuming *arguendo* these are distinguishable from other MVPD matters) over the past year. The Commission made it clear when setting the initial DBS rate that it "would update this rate for future years, based on relevant information, as necessary for ensuring an appropriate level of regulatory parity and considering the resources dedicated to this new regulatory fee subcategory."[19] The key phrase in this commitment overlooked by the DBS providers is that an adjustment would be made "as necessary for ensuring an appropriate level of regulatory parity." In making its fee determinations under Section 9 of the Act, the Commission is authorized to make adjustments "to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities . . . and other factors that the Commission determines are necessary in the public interest."[20]

Thus, the Commission is not required to demonstrate that the amount of Media Bureau resources "appropriated for DBS activities" has grown year-over-year to adjust the rate assessed DBS providers, as AT&T and DISH suggest.[21] Rather, it is authorized by Congress to set fee levels to achieve an appropriate degree of regulatory parity, as the Commission stated in its 2015 Fee Order, or for other reasons that the Commission may determine "are in the public interest." In this case, an appropriate degree of regulatory parity would mean requiring cable and IPTV operators and DBS providers to pay the same level of fees supporting Media Bureau administration of MVPD regulation and oversight based on years of comparable work, both in

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[19] FY 2015 Order and FNPRM, ¶ 20.

[20] 47 U.S.C. § 159(b)(1)(A).

[21] *See* FY 2015 Order and FNPRM, ¶ 20, n.83 ("The agency is not required to calculate its costs with 'scientific precision.' *Central & Southern Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 736 (D.C. Cir. 1985). Reasonable approximations will suffice. *Id.; Mississippi Power & Light*, 601 F. 2d at 232; *National Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1105 (D.C. Cir. 1976); 36 Comp. Gen. 75 (1956).").

the past and most recently. It is also in the public interest to put a conclusive end to the equitable problem of the Commission's fee program competitively disadvantaging the cable television industry by requiring them to shoulder the lion's share of Media Bureau fees related to MVPD regulation.[22]

Notwithstanding the fact that the Commission is not required to demonstrate that the amount of Media Bureau resources "appropriated for DBS activities" has grown year-over-year before adjusting the rate assessed DBS providers in setting regulatory fee levels, the evidence available nonetheless highlights that the workload this year has been comparable between cable operators and IPTV and DBS providers just as it has been comparable in years past. In addition to the two proceedings cited by the NPRM, there are numerous ongoing proceedings where cable, IPTV, and DBS providers are using the exact same Media Bureau resources, many of which were cited by the Commission in establishing the DBS subcategory,[23] not to mention that the DBS providers themselves have continued to seek Media Bureau assistance within the past fiscal year, such as the retransmission consent complaint DISH filed last fall against Sinclair.[24] In particular, the Media Bureau's part in implementing the Twenty-First

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[22] The GAO Report, issued in 2012, criticized the Commission's regulatory fee program and called for its overhaul. Among other things, in its section on probable cross-subsidization between industry sectors, the GAO Report cited arguments of the National Cable and Telecommunications Association that the Commission's regulatory fee process competitively disadvantaged cable operators. GAO Report at 17-20. *See also* FY 2015 NPRM and Order, ¶ 30, n.102. The GAO characterized the problem as "raising equity concerns." GAO Report at 17.

[23] *See* FY 2015 NPRM and Order, ¶¶ 31-32 (identifying Media Bureau activities implementing recent legislation applicable to all MVPD, including the CALM Act, Twenty-First Century Communications and Video Accessibility Act of 2010, and Satellite Television Extension and Localism Act (STELA) Reauthorization Act alone as justification for adopting a permitted amendment to include DBS in the Cable/IPTV fee category); ACA Comments at 8-9 (discussing previous ACA and NCTA submissions demonstrating that the resources utilized by DBS providers are roughly similar to those used by cable operators and IPTV providers.

[24] *DISH Network L.L.C. v. Sinclair Broadcast Group, Inc.*, Verified Amended and Restated Retransmission Complaint and Request for Preliminary Injunctive Relief Request for Dismissal of Pleadings and Termination of Proceeding, MB Docket No. 12-1, File. No. CSR-_____-C (filed Aug. 26, 2015); Letter from Jeffrey H. Blum, Senior Vice President and Deputy General Counsel, DISH Network, LLC, to Marlene H. Dortch, Secretary (filed Nov. 25, 2016) (seeking dismissal of the complaint because DISH and Sinclair had reached a retransmission consent agreement resolving the dispute).

Century Communications and Video Accessibility Act of 2010 ("CVAA") and STELA Reauthorization Act ("STELAR") are far from over; the rulemakings and other inquiries these pieces of legislation have spawned regarding MVPD regulation are both on-going and are actively participated in by DBS and cable and IPTV providers alike. An examination of Media Bureau filings shows that DBS providers involve themselves in proceedings of the Media Bureau involving MVPD regulation as much as, and often more often than, other MVPDs. Since September 2015 alone, the date of the 2015 Fee Order, DBS providers made nearly 100 filings in Media Bureau dockets.[25] While a dozen of these were filings of AT&T/DIRECTV in support of their proposed merger, AT&T/DIRECTV and DISH also filed 86 times in the past nine months in other MVPD dockets such as the Charter-Time Warner Cable-Bright House Networks merger, retransmission consent reform, the DSTAC Report, the set-top box proposal, market modification, independent programming inquiry, and CVAA implementation. In comparison, among the 10 largest cable and IPTV providers (excluding AT&T U-verse), an average of 22 filings were made in Media Bureau dockets over the same period – significantly more than half of which were made in the affected providers' own merger dockets. Moreover, even a cursory review of the ex parte filings of the two DBS providers reflects that numerous members of the Media Bureau have dedicated their time and resources to matters of interest to DBS and cable operators and IPTV providers alike.[26] Accordingly, the fact that the NPRM cited only two ongoing proceedings in support of adjusting the DBS fee upwards is of little significance.

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[25] See Attachment A (summarizing filings from AT&T/DIRECTV and DISH in Media Bureau dockets in the Commission's Electronic Comment Filing System ("ECFS") between September 2015 and June 30, 2016. In formulating the lists, ACA compiled a list of Media Bureau dockets in which the 10 largest MVPDs have made filings from September 2015 through June 2016. For each docket, ACA searched by filer name, filtering out Express Comments, and then manually counted each search result to filter out duplicate filings.

[26] *See* Attachments B and C (summarizing Media Bureau personnel present at DBS provider ex parte meetings from September 2015 – June 2016). In formulating the lists, ACA compiled a list of Media Bureau dockets in which the 10 largest MVPDs have made filings from September 2015 through June 2016. For each docket, ACA searched by filer name, filtering out Express Comments, and then manually counted each search result to filter out duplicate filings. Nonetheless, survey results show that

Moreover, contrary to the suggestion of the DBS providers, the Commission has long recognized that it is infeasible to particularize regulatory fee assessments to the specific entity-to-entity use that may be made of the Commission's resources and instead applies rates to broad categories of similar providers.[27] Rather, in determining the comparability of work performed by FTEs within a Bureau on behalf of various industry segments, it has grouped providers of like services, many of whom compete with one another, into fee categories regardless of disparities in the nature and level of regulatory services performed by each type of provider, the types of business models represented, or fluctuations in usage of regulatory resources year-over-year among providers of essentially identical services.[28] For example, as the Commission has found, "Section 9 does not require the Commission to engage in a company-by-company assessment of relative regulatory costs. In any given year, companies grouped in the [telecommunications] category, or other regulatory fee categories, might be the subject of more regulation than others, e.g., merger proceedings. As a result, our responsibility here is to identify the category of regulatory fee payees with which interconnected VoIP providers most closely relate."[29] This is a sound principle and there is no reason to reject it now in support of a methodology based on calculating specific numbers of Media Bureau FTEs that work on DBS matters versus those that work on cable matters or a calculation of precise increases or decreases in regulatory activities with respect to MVPD services year-over-year.

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AT&T/DIRECTV had at least seven meetings with Media Bureau personnel on issues pertaining to MVPD service during this period. Similarly, DISH (together with affiliate EchoStar in several instances) had six meetings on such matters during this period.

[27] *See* FY 2015 NPRM and Order, ¶ 33.

[28] *See* NCTA-ACA 2014 Comments at 8-10 (discussing inclusion of IPTV in the Cable Television fee category despite recognition of some differences from a regulatory perspective and voice over Internet Protocol services in the same Interstate Telecommunications Service Provider ("ITSP") fee category as telecommunications service providers despite significant differences in the extent of regulation between the two services and business models of the providers).

[29] *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712, ¶ 19 (2007).

It is beyond dispute today that as a result of all of this activity cable, IPTV and DBS providers impose roughly the same burden on Media Bureau resources devoted to regulation of MVPD services. In creating the DBS subcategory, the Commission recognized that "although DBS is not identical to cable television and IPTV, the services all receive the oversight and regulation as a result of the work of Media Bureau FTEs on MVPD issues," and "[t]he burden imposed on the Commission is therefore similar."[30] The logic of this determination strongly suggests that the DBS providers are not entitled to an unreasonably low per subscriber fee level for eternity. Rather, all MVPDs should be assessed the same level of per subscriber Media Bureau regulatory fees. The Commission is fully justified in adjusting the Media Bureau fees paid by DBS providers upward both in consideration of "the resources dedicated to this new regulatory fee subcategory," and "to ensure an appropriate level of regulatory parity," as it stated it would do in its order setting the DBS fee level for FY 2015.[31]

### B. DBS Provider Claims of "Rate Shock" and Harms to DBS Customers Are Wholly Unwarranted.

Despite having notice for years that they would be paying regulatory fees to support Media Bureau FTEs engaged in regulatory activities applying equally to all MVPDs, the DBS providers submit that even the proposed modest upward adjustment to the DBS fee proposed in the NPRM would cause "rate shock." AT&T and DISH both note that in the past the Commission had imposed a 7.5 percent cap on fee increases for its regulatees, and suggest that the Commission has wrongly abandoned its concern about "rate shock" in setting the DBS rate.[32] These claims are similar to requests made by the DBS providers in 2014 that the

[30] FY 2015 Order and FNPRM, ¶ 33.

[31] *See* FY 2015 Order and FNPRM, ¶ 20.

[32] AT&T Comments at 1-2 ("Three years ago, the Commission was solicitous about "sudden and large changes in the amount of fees paid by various classes of regulatees" and capped fee increases at 7.5% in that proceeding to avoid "rate shock."[32] The Commission has now seemingly made peace with "rate shock," proposing an increase that is 17 times greater than the cap announced in 2013."); DISH Comments at 7 ("The Commission has previously taken care to avoid rate shock by ensuring that

Commission implement any increases to the DBS fee level over time and that it not exceed a 7.5 percent increase per year.[33] These arguments were unsound then, are unsound now, and should be rejected.

The DBS providers once again are incorrect in their suggestion that the Commission's use of a cap on regulatory fee increases for FY 2014 set policy for all time for all future regulatory fees.[34] The Commission refused to embrace the DBS providers' claims that "rate shock" would ensue if the initial DBS fee for FY 2015 caused DBS providers to pay more than an increase of 7.5 percent in regulatory fees over the amounts assessed in the preceding year.[35] The Commission specifically found that it is "not required to adopt a cap every year" and had only done so in 2013 out of concern about the impact that a substantial change to its assessment program (reallocating FTEs) would have on small entities – those who can least bear an unexpected upward change in their operating costs[36] – a category that DISH and DIRECTV (now AT&T) did not claim to be within.[37]

Accordingly, the Commission neither adopted a cap on DBS rates, nor sought comment on one, but rather committed to a phase-in program for DBS by introducing it initially as a

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regulatees are not subject to dramatic increases in fees. For example, in 2013, the Commission set a cap of 7.5 percent on fee increases for licensees subject to regulatory fees.").

[33] *Assessment and Collection of Regulatory Fees*, MD Docket Nos. 14-92, 13-140, 12-201, Comments of DIRECTV, LLC and DISH Network LLC at 16 (filed Nov. 26, 2014), *citing Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, Report and Order, 28 FCC Rcd 12351, ¶ 13 (2013) ("2013 Fee Order").

[34] *See Assessment and Collection of Regulatory Fees*, MD Docket Nos. 14-92, 13-140, 12-201, Reply Comments of the National Cable & Telecommunications Association and the American Cable Association at 17 (filed Dec. 26, 2014) ("NCTA-ACA 2014 Reply Comments").

[35] *See* FY 2015 NPRM and Order, ¶ 38. *See also* FY 2015 Order and FNPRM, ¶ 20 (adopting proposed initial DBS fee of 12 cents per subscriber per year as sensible and based on data and analysis).

[36] 2013 Fee Order, ¶¶ 22-25.

[37] *See* FY 2015 NPRM and Order, ¶ 38.

subcategory of the cable television and IPTV category.[38] In other words, the Commission has already soundly rejected the view that it must cap rate increases at the set level of 7.5 percent per year and has previously addressed any plausible concerns about DBS "rate shock" by phasing-in the fee subcategory and by setting a disproportionately and unreasonably low initial fee.[39]

It is worth noting that in assessing IPTV providers Media Bureau fees equal to those paid by cable operators for the first time – 99 cents per subscriber per year – neither the Commission nor the IPTV providers raised concerns about rate shock.[40] Nor did AT&T, the largest IPTV provider protest the assessment on the grounds of rate shock. AT&T's complaint at the time was that the Commission should not make piece-meal expansions of the base of fee payors supporting Media Bureau MVPD activities, but rather should examine creating an MVPD fee category, which would have included DBS.[41] If going from zero to 99 cents per subscriber per year was neither a concern of AT&T nor resulted in any IPTV provider rate shock, it is far from clear how going from 12 to 24 cents per subscriber per year (or more), would generate unacceptable rate shock for either AT&T or DISH.

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[38] *See* FY 2015 NPRM and Order, ¶ 38 ("This phased approach is consistent with the interim approach the Commission took in the FY 2013 Report and Order to 'avoid sudden and large changes in the amount of fees' and addresses DIRECTV and DISH's concerns.").

[39] It is fully within the Commission's discretion to impose a cap on regulatory fee increases or not impose a cap and to set caps of different sizes as appropriate in the circumstances in which a cap is warranted. As the Commission explained in its FY 2013 Order, it had implemented a 25 percent cap on certain regulatory fee increases in 2007 and chose to implement a different percentage rate cap for FY 2014 based on a different set of circumstances. 2013 Fee Order, ¶ 23.

[40] *Id.*, ¶ 33. The same is true when the Commission added interconnected VoIP to the Interstate Telecommunications Service Provider ("ITSP") fee category – rate shock was not a consideration. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712, ¶ 20 (2007).

[41] *See* 2013 Fee Order, ¶ 33, n. 83, *citing Assessment and Collection of Regulatory Fees, Assessment and Collection of Regulatory Fees for the Fiscal Year 2013, Assessment and Collection of Regulatory Fees for the Fiscal Year 2008*, MD Docket Nos. 12-201, 13-58, 08-65, Comments of AT&T at 4-5 (filed June 19, 2013) (recommending a single MVPD fee category that would include all MVPDs).

There is no need for any phase-in for DBS fees at the existing level (or at a higher level). Even if passed through, an increased fee (if set at 72 cents per subscriber per year) would amount to roughly six cents per month per subscriber. Even for a DBS subscriber at a temporary $19.99 per month introductory rate, a fully passed-through fee of that size would cause a rate increase of three one-hundredths of one percent. At the higher rates paid by AT&T's and DISH's average subscribers,[42] the six cents per month regulatory fee – if fully passed through – would represent an increase of well less than one one-hundredths of a percent. Moreover, AT&T and DISH are huge, financially successful companies and the largest and fourth largest MVPDs, respectively, in the nation.[43] These are multi-billion dollar corporations for which even substantial fee increases would cause minimal disruption and no threat to operational viability. Nonetheless, if they find passing through the modest regulatory fee increases ACA proposes to their DBS customers distasteful, they have the wherewithal to assume those fees themselves as a cost of doing business.

In assessing whether any additional time is needed to phase-in the DBS rate to full parity with the rate assessed cable operators and IPTV providers, the Commission must keep in mind that further delay in assessing DBS regulatory fees on the same basis as cable operators and

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[42] AT&T's average revenue per unit ("ARPU") customer in the fourth quarter of 2015 was $120.59 per month. AT&T Financial and Operational Results, Jan. 26, 2016, at 13 ("AT&T 2015 Report"), *available at* https://www.att.com/Investor/Earnings/4q15/master_4q15.pdf. http://variety.com/2014/biz/news/directv-loses-28000-u-s-subscribers-in-q3-as-revenue-rises-1201349475/http://variety.com/2014/biz/news/directv-loses-28000-u-s-subscribers-in-q3-as-revenue-rises-1201349475/DISH's ARPU over the first quarter of 2016 was $87.94 *See* Press Release, DISH Network Corp., DISH Network Reports First Quarter 2016 Financial Results (Apr. 20, 2016), *available at* http://about.dish.com/press-release/financial/dish-network-reports-first-quarter-2016-financial%C2%A0results.

[43] Yahoo! Finance reports that DISH Network has a market cap of $24.24 billion and AT&T, Inc., parent of DIRECTV, has a market cap of $260.85 billion. Each has annual operating profits in the billions of dollars. See AT&T 2015 Report at 8 (reporting 2015 revenues of $ 146 billion and operating profit of over $24 billion)http://www.att.com/gen/landing-pages?pid=5718http://www.att.com/gen/landing-pages?pid=5718; DISH Network Annual Report 2014, at 55 (reporting 2015 revenues of $15 billion and operating profit of $1.3 billion), *available at* *http://files.shareholder.com/downloads/DISH/2333844597x0x883714/62FF4F04-C74D-4BCE-ABB1-26FDDF45F7E9/2015_Annual_Report_-_Webpost.pdf*.

IPTV providers means a concomitant delay in the long-overdue reduction of Media Bureau fees paid by cable and IPTV providers, thus extending the already lengthy period of time cable operators and IPTV providers – and by, extension, their subscribers – must subsidize their direct competitors. If it is unfair to ask DBS providers to pay their fair share of Media Bureau regulatory fees, it is perforce unfair to ask cable operators and IPTV providers – and ultimately their subscribers – to continue to pay the DBS providers' share of regulatory fees for them.

### C. Claims That an Upward Adjustment in the DBS Fee Level Will Create Future Uncertainty Should Be Rejected.

DISH argues that the proposed fee increase will harm consumers, "who will ultimately be forced to shoulder the burden of any increased regulatory fees," and that this sudden and "dramatic increase" in DBS fees "generates significant concerns for DISH and its subscribers regarding what to expect in future years.[44]

The Commission can easily address the concern raised by DISH about future regulatory fee level uncertainty by bringing DBS into full parity with the Cable/IPTV fee level for FY 2016. Going forward, the DBS providers will know for certain that they will be assessed the same Media Bureau regulatory fees as all other payors in the Cable/IPTV fee category.

## III. CONCLUSION

No basis has been provided for either keeping the DBS regulatory fees at their current level of 12 cents per subscriber per year or adjusting upward only to a baseline level of 24 cents per subscriber per year, well below the rate assessed other payors in the same Cable/IPTV fee category. ACA continues to believe that a brief and limited phase-in period to avoid any conceivable claim of "rate shock" while DBS providers had the opportunity to adjust to the new fee schedule was the correct approach. However, as the Commission has already given AT&T and DISH time to adjust to paying Media Bureau fees, it should now move to assess all fee

[44] DISH Comments at 1, 6, 8.

payors in the Cable/IPTV fee category the same per subscriber rate. The time has come for the Commission to finish the task of bringing greater fairness and competitive and technological neutrality by creating complete regulatory fee parity for all payors in the Cable/IPTV fee category. The Commission should require DBS operators to pay the same rate as Cable/IPTV and should institute this change forthwith.

Respectfully submitted,

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July 5, 2016

# ATTACHMENT A

## MVPD Filings in Media Bureau Since September 2015

| MVPD | MB Docket Totals | Topics of Filings |
|---|---|---|
| AT&T/DIRECTV | 38 (12 in own merger docket) | Charter/TWC/BHN Merger; Totality of Circumstances Test; Amendment of the Commission's Rules Related to Retransmission Consent; STB Proposal; DSTAC Report; DirecTV/AT&T Merger; Promoting the Availability of Diverse and Independent Sources of Video Programming; Market Modification; Cable Special Relief Petitions; Multichannel Video Programming Distribution Services; CVAA |
| DISH | 60 | Charter/TWC/BHN Merger; Totality of Circumstances Test; Amendment of the Commission's Rules Related to Retransmission Consent; STB Proposal; DSTAC Report; Media General/Nexstar Merger; STELAR Feasibility Certification, Market Modification; Sun Broadcasting, Inc. Complaint Against OpticalTel Telecommunications, Inc. Concerning Retransmission of WXCW(TV), Naples, FL; Cable Special Relief Petitions |
| Comcast | 37 (19 in own merger docket) | Charter/TWC/BHN Merger; STB Proposal; Comcast/NBCU Assignment and Transfer; Petition for Declaratory Ruling on Email Notices; Liberman Broadcasting, Inc. v. Comcast Corp.; Promoting the Availability of Diverse and Independent Sources of Video Programming; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming |
| Time Warner Cable | 36 (29 in own merger docket) | Charter/TWC/BHN Merger; Totality of Circumstances Test; Amendment of the Commission's Rules Related to Retransmission Consent; STB Proposal; Opposition to Must Carry Complaint filed by PMCM TV, LLC |
| Verizon | 11 | Charter/TWC/BHN; Totality of Circumstances Test; Amendment of the Commission's Rules Related to Retransmission Consent; STB Proposal; Promoting the Availability of Diverse and Independent Sources of Video Programming |
| Charter | 71 (66 in own merger docket) | Charter/TWC/BHN Merger; Totality of Circumstances Test; STB Proposal; Petition for Declaratory Ruling on Email Notices |
| Cox Communications | 5 | STB Proposal; Media General/Nexstar Merger; Petition for Declaratory Ruling on Email Notices |
| Cablevision | 4 | Totality of Circumstances Test; Game Show Network, LLC v. Cablevision Systems Corp. |
| Bright House Network | 15 (15 in own merger docket) | Charter/TWC/BHN Merger |
| Suddenlink | 1 | Petition for Declaratory Ruling on Email Notices |
| Mediacom | 18 | Totality of Circumstances Test; Amendment of the Commission's Rules Related to Retransmission Consent; STB Proposal |

**ATTACHMENT B**

**AT&T / DIRECTV Ex Parte Notices of Meetings Attended by Media Bureau Personnel (Sept. 2015 – present)**

| Name of Ex Parte Filer | Docket(s) | Date of Notice | Media Bureau Personnel in Attendance |
|---|---|---|---|
| AT&T | MB 16-42 and CS 97-80: STB Proposal | May 24, 2016 | Susan Singer, Kathy Berthot, Martha Heller, Calisha Myers, Mary Beth Murphy, Nancy Murphy |
| AT&T | MB 15-216: Totality of the Circumstances Test<br>MB 10-71: Amendment of the Commission's Rules Related to Retransmission Consent | Mar. 16, 2016 | Bill Lake, Michelle Carey, Martha Heller, Steve Broeckaert, Diane Sokolow, David Konczal, Calisha Myers |
| AT&T | MB 15-64: Media Bureau Seeks Comment on DSTAC Report | Jan. 13, 2016 | William Lake, Michelle Carey, Mary Beth Murphy, Susan Singer, Nancy Murphy, Martha Heller, Brendan Murray, and Lyle Elder |
| AT&T | GN 12-268: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions | Dec. 18, 2015 | Michelle Carey, Pam Gallant and Barbara Kreisman |
| AT&T | MB 15-149: Charter/TWC/BHN Merger | Nov. 16, 2015 | Susan Singer |
| AT&T | MB 15-149: Charter/TWC/BHN Merger | Oct. 21, 2015 | Susan Singer |
| AT&T | GN 12-268: Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions<br>AU 14-252: Broadcast Incentive Auction Comment Public Notice Auction 1000, 1001 and 1002 | Sept. 21, 2015 | Joyce Bernstein |

## ATTACHMENT C

### DISH Ex Parte Notices of Meetings Attended by Media Bureau Personnel (Sept. 2015 – present)

| Name of Ex Parte Filer | Docket(s) | Date of Notice | Media Bureau Personnel in Attendance |
|---|---|---|---|
| EchoStar and DISH | MB 16-42 and CS 97-80: STB Proposal | June 8, 2016 | Bill Lake, Mary Beth Murphy, Michelle Carey, Nancy Murphy, Susan Singer; Martha Heller, Brendan Murray, Maria Mullarkey, Kathy Berthot, Lyle Elder; Andrew Manley, Kelsie Rutherford, Arian Attar, and Anne Russell |
| DISH | MB 15-149: Charter/TWC/BHN Merger | Feb. 26, 2016 | William Lake, Hillary DeNigro, Brendan Holland, Ty Bream, Julie Saulnier, Jamila Bess Johnson, Alexis Zayas, and Eugene Kiselev |
| DISH | MB 15-149: Charter/TWC/BHN Merger | Feb. 12, 2016 | Julie Saulnier, Hillary DeNigro, Ali Zayas, Ty Bream, Jessica Campbell, Mitali Shah, Jamila Bess-Johnson, Susan Singer, and Eugene Kiselev |
| EchoStar and DISH | MB 15-64: Final Report of the DSTAC | Jan. 14, 2016 | Bill Lake, Michelle Carey, Nancy Murphy, Susan Singer, Mary Beth Murphy, Brendan Murray, Martha Heller, and Lyle Elder |
| DISH | MB 15-149: Charter/TWC/BHN Merger | Dec. 2, 2015 | William Lake, Hillary DeNigro, Ty Bream, Jamila Bess Johnson, Alexis Zayas, Julie Saulnier, and Mitali Shah |
| DISH | MB 15-149: Charter/TWC/BHN Merger | Nov. 6, 2015 | William Lake, Susan Singer, Hillary DeNigro, Jessica Campbell, Ty Bream, Jamila Bess Johnson, Christopher Clark, Mitali Shah, and Julie Saulnier |